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## EDDIE HO TOON NGEE

v.

## PRINCE FLORA (M) SDN BHD

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: J-02-1276-2009]

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17 MAY 2011

***LAND LAW:*** *Tenancy - Option to purchase - Specific performance - Specific performance of option to purchase tenanted property - Deposit of purchase price paid to solicitors acting for both landlord and tenant in tenancy agreement - Whether solicitors only acting for tenant - Whether no longer acting for landlord in relation to exercise of option to purchase - Whether landlord entitled to vacant possession and double rentals*

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By a tenancy agreement dated 20 July 1988 prepared by their common solicitors, Messrs Lim, Han & Teoh ('Messrs LHT'), the plaintiff and the defendant agreed that the plaintiff would rent the defendant's land for a term of three years and would have an option to purchase the property for a specified price if the option is exercised before the expiry of the tenancy period. In 1989, in purported exercise of the option to purchase, the plaintiff paid 10% of the purchase price (RM41,000) to Messrs LHT, whom the plaintiff deemed and regarded as still acting for the defendant. The defendant denied that he had been paid the 10% deposit, or that Messrs LHT were acting for him when receiving the said money, and contended in any case that, to the knowledge of Messrs LHT, the solicitors acting for him at the material time was one Messrs Ho Thian Cheh & Co. The parties having been unable to resolve their dispute, the plaintiff filed an action for specific performance of the option-to-purchase clause, while the defendant counter-claimed for vacant possession and double rentals for alleged holding over of the tenancy by the plaintiff. The learned Judicial Commissioner found that Messrs LHT were, at material time of receiving the money, acting for both parties, and consequently allowed the claim and dismissed the counter-claim. The defendant appealed and the primary issue that arose was

whether on the facts and in the circumstances Messrs LHT herein could be said to be acting only for the plaintiff when receiving the RM41,000 from the latter.

**Held (allowing appeal with costs)**
**Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:**

**(1)** The finding of the learned Judicial Commissioner is against the weight of the totality of the evidence adduced before the court. (para 18)

**(2)** It is true that Messrs LHT had acted for both the landlord and the tenant when preparing the tenancy agreement in 1988. But that fact alone could not give rise to any inference or presumption that they were still acting for the defendant when they accepted the payment of RM41,000 from the plaintiff. The evidence showed that there was no clear authorization by the defendant for Messrs LHT to accept the payment as his solicitors for the purpose of the option to purchase. There was further no evidence that the defendant had ever appointed Messrs LHT to act for him in the matter of the option or the sale and purchase of the tenanted property. Documentary evidence, on the contrary, confirmed that the defendant's solicitors, at all material times, were that of Messrs Ho Thian Cheh & Co. Consequently, Messrs LHT, at the time when the payment of RM41,000 was made to them by the plaintiff, were only acting as solicitors for the plaintiff. (para 19)

**(3)** In consequence, the order of the High Court is set aside, and the defendant's counter-claim for delivery of vacant possession of the land and for double rental as per the pleading is allowed. Likewise, there should also be an order that the caveat lodged by the plaintiff over the land be removed forthwith. (paras 21 & 22)

*[Order accordingly. Costs of RM15,000 awarded against respondent]*

***Bahasa Malaysia*** *Translation Of Headnotes*

Melalui satu perjanjian tenansi bertarikh 20 Julai 1988 yang disediakan oleh peguamcara bersama mereka, Messrs Lim, Han & Teoh ('Messrs LHT'), plaintif dan defendan bersetuju bahawa

plaintif akan menyewa hartanah defendan untuk tempoh tiga tahun dan mempunyai opsyen untuk membeli hartanah tersebut jika opsyen dilaksanakan sebelum tempoh tenansi berakhir. Pada tahun 1989, atas hasratnya untuk melaksanakan opsyen, plaintif telah membayar 10% harga pembelian (RM41,000) kepada Messrs LHT, yang plaintif anggap sebagai masih mewakili defendan. Defendan menafikan telah dibayar deposit 10% tersebut atau bahawa Messrs LHT bertindak bagi pihak dirinya apabila menerima wang berkenaan, dan walau apapun berhujah bahawa, peguamcara yang bertindak untuk dirinya pada waktu material, seperti yang diketahui oleh Messrs LHT, adalah Messrs Ho Thian Cheh & Co. Pihak-pihak gagal menyelesaikan pertelingkahan mereka tersebut, dan berikutnya plaintif memfail tindakan menuntut pelaksanaan spesifik klausa opsyen-untuk-membeli, sementara defendan menuntut balas untuk milikan kosong serta sewaan berganda atas alasan berlaku pemegangan lepas masa terhadap tenansi oleh plaintif. Yang arif Pesuruhjaya Kehakiman mendapati bahawa Messrs LHT bertindak untuk kedua-dua pihak semasa menerima wang dari plaintif, dan dengan itu telah membenarkan tuntutan dan menolak tuntutan balas. Defendan merayu dan isu penting yang berbangkit adalah sama ada Messrs LHT dalam suasana dan halkeadaan yang wujud boleh dianggap sebagai hanya bertindak untuk plaintif apabila menerima RM41,000 dari pihak terkemudian tersebut.

**Diputuskan (membenarkan rayuan dengan kos)**

**Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman dari mahkamah:**

**(1)** Dapatan yang arif Pesuruhjaya Kehakiman adalah bertentangan dengan arus keseluruhan keterangan yang dikemukakan di hadapan mahkamah.

**(2)** Adalah benar bahawa Messrs LHT bertindak bagi pihak kedua-dua tuantanah dan penyewa bilamana menyediakan perjanjian pada tahun 1988. Tetapi fakta ini sahaja tidak boleh membangkitkan inferens atau andaian bahawa mereka masih lagi bertindak bagi pihak defendan apabila mereka menerima pembayaran RM41,000 tersebut dari plaintif. Keterangan menunjukkan tidak terdapat sebarang arahan oleh defendan untuk Messrs LHT menerima pembayaran sebagai peguamcara beliau bagi maksud opsyen untuk membeli. Juga tidak terdapat keterangan bahawa defendan pernah pada bila-bila masa pun

melantik Messrs LHT untuk bertindak bagi pihak dirinya dalam perkara opsyen atau penjualan dan pembelian hartanah yang disewa. Keterangan dokumentari malah mengesahkan bahawa peguamcara defendan, pada semua waktu material, adalah Messrs Ho Thian Cheh & Co. Oleh itu, Messrs LHT, semasa pembayaran dibuat kepada mereka oleh plaintif, hanya bertindak sebagai peguamcara plaintif.

**(3)** Oleh yang demikian, perintah Mahkamah Tinggi diketepikan, dan tuntutan balas defendan untuk milikan kosong hartanah dan sewa berganda seperti yang diplidkan adalah dibenarkan. Begitu juga, perintah selanjutnya adalah dibuat supaya kaveat yang dimasukkan oleh plaintif dikeluarkan dengan serta merta.

*[Perintah sekadarnya. Kos sebanyak RM15,000 diperintahkan terhadap plaintif].*

*For the defendant/appellant - Dr Wong Kim Fatt (Bernard George with him); M/s Tay Bernard & Cheong*
*For the plaintiff/respondent - Ang Boon Heng (Koh Lian Kin with him); M/s HH Long & Co*

*[Appeal from High Court, Johor Bahru; Civil Suit No: 22-87-1995]*

*Reported by Wan Sharif Wan Ahmad*

## JUDGMENT

**Hishamudin Mohd Yunus JCA:**

**[1]** This is an appeal against the decision of the High Court of Johor Bahru of 15 June 2009.

**[2]** On 15 June 2009 the High Court of Johor Bahru had allowed the plaintiff's (who is now the respondent before us) claim against the defendant (who is now the appellant before us) for the specific performance of an option to purchase clause in a tenancy agreement.

**[3]** The appellant/defendant had appealed to this court (Court of Appeal) against that decision.

**[4]** We have unanimously allowed the appeal with costs. We now give our reasons.

**[5]** On 20 July 1988 the plaintiff company, at the time known as Tae Tse (M) Sdn Bhd, and the defendant, Eddie Ho Toon Ngee (the administrator of the estate of one Ho Meng Quee, deceased) entered into a tenancy agreement. By this tenancy agreement, the defendant lets out his land to the plaintiff for a term of three years, with an option to renew for a period of three years effective from 1 November 1991.

**[6]** The plaintiff company subsequently changed its name to Prince Flora (M) Sdn Bhd.

**[7]** The tenancy agreement also grants the tenant with another option: cl. 4 of the tenancy agreement grants the respondent/plaintiff, the tenant, an option to purchase the tenanted property (the land). The clause states:

> The Landlord hereby grants unto the Tenant an option to purchase the Demised Land at the price of $14,000.00 per acre to be exercised within the period of the tenancy herein created and that should the purchase price be settled before the tenancy period herein created expires, there shall be a refund of the rentals for the unexpired period, such discount/refund of rentals paid shall be made pro rata basis and that such discount/refund shall be utilized towards part payment of the total purchase price.

**[8]** It is to be noted that the exercise of the option to purchase is subject to the following terms. First, the purchase price of the property is RM14,000 per acre. Second, the option to purchase must be exercised before the expiry of the tenancy period.

**[9]** The plaintiff was desirous of exercising the option to purchase. So, on 20 December 1989, with the intention of exercising the option to purchase, it made a payment by cheque of RM41,000 (being 10% and part payment of the purchase price) to a firm of solicitors, Messrs Lim, Han & Teoh, the firm of solicitors who had earlier prepared the tenancy agreement for both the landlord and the tenant.

**[10]** It does not appear to be disputed that that right to purchase may be exercised by the plaintiff by paying 10% of the purchase price either to the defendant (the vendor) directly or to the defendant's solicitors, as part payment.

**[11]** It is also not disputed that the deposit money of RM41,000 (the 10%) was never paid by the plaintiff directly to the defendant. A

**[12]** It is, however, the contention of the plaintiff that the money was paid to Messrs Lim Han & Teoh as solicitors for the defendant (see para. 6 of the statement of claim). Mr. Lin Yu Tien (PW1) the managing director of the plaintiff company testified to that effect: B

> Deposit dibayar kepada peguam defendan iaitu Tetuan Lim, Han & Teoh.

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**[13]** But PW1 does not explain the basis for saying that Messrs Lim, Han & Teoh was the defendant's solicitors for the purpose of the exercise of the option.

**[14]** The defendant, on the other hand, disputes this allegation. It is submitted by the defendant that when the payment of the RM41,000 was made to Messrs Lim Han & Teoh, it was made to that firm as solicitors for the plaintiff only. It is the contention of the defendant that at all material time he had his own solicitors, namely, Messrs Ho Thian Cheh & Co, and that Messrs Lim, Han & Teoh was aware of this fact. D E

**[15]** Whilst the plaintiff is claiming against the defendant for specific performance of the option to purchase clause, the defendant, on the other hand, is counter-claiming against the plaintiff for vacant possession of the tenanted property (the land) and for double rental for the period that the plaintiff is occupying the land beyond the tenancy period. F

**[16]** Thus the crucial issue is this: Was Messrs Lim, Han & Teoh acting as solicitors for the defendant at the time when the payment of RM41,000 was made by the plaintiff to that firm? The learned Judicial Commissioner, at the conclusion of the trial, made a finding (it would appear by way of inference) that the said firm, at the time of receiving the money, were acting as solicitors for both parties, meaning acting for the defendant (as the vendor) as well as for the plaintiff (as the purchaser). Her reason for saying so is that Messrs Lim, Han & Teoh had acted for both parties at the time of preparing the tenancy agreement. In her judgment she said: G H

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5. In P19, M/s Lim, Han & Teoh had clearly stated that they were the solicitors on record acting for both parties at the time of execution of the tenancy agreement. When no reply was forthcoming, a reminder was sent on 31.1.1990 (P18).

**[17]** The letter P19 that is referred to in the judgment reads:

22.12.89

M/s. Ho Thian Cheh & Co.
Advocates & Solicitors
4th Floor, OCBC Building
Jalan Ibrahim
Johor Bahru

Dear Sirs,

**Re: Purchase of properties held under EMR 470, 471, 472 and 473 for Lot Nos. 363, 364, 365, 366 respectively, Mukim of Senai-Kulai**

We act for M/s. Princeflora (M) Sdn. Bhd. (formerly known as Tae Tse (M) Sdn. Bhd.) who are the intending purchasers of the above properties.

We understand that you are acting for Mr. Eddie Ho Toon Ngee the sole surviving administrator of the estate of Ho Meng Quee (deceased).

By a tenancy agreement dated 20th July, 1988 your client has granted an option in favour of our clients to purchase the above properties at RM$14,000/- per acre.

Please be informed that our clients have exercised the option to purchase the above properties by paying to us (as solicitors on record acting for both parties at the time of execution of the said agreement dated 20th July, 1988) the sum of M$41,000/- being deposit and part-payment of the purchase price of the above properties.

Kindly let us know whether you have any objection to us preparing the Sale and Purchase agreement which will be sent to you for your client's execution in due course.

Your early reply is appreciated.

Yours faithfully,

... sgd ...

**[18]** With respect, we are of the view that the finding of the learned Judicial Commissioner is against the weight of the totality of the evidence adduced before the court.

**[19]** In our judgment, after examining the evidence, it is our finding that Messrs Lim, Han & Teoh, at the time when the payment of RM41,000 was made to them by the plaintiff/purchaser, were acting only as solicitors for the plaintiff/purchaser. It is, however, true that it is not disputed that Messrs Lim, Han & Teoh acted for both the landlord and the tenant in preparing the tenancy agreement in 1988 (it is to be recalled that the tenancy agreement was signed on 20 July 1988). But from this fact alone it cannot be inferred that Messrs Lim, Han & Teoh were still acting as solicitors for the defendant when they agreed to accept the payment of RM41,000 from the plaintiff/purchaser, unless there is clear authorization by the defendant – and there is none in the present case – to them to accept the payment as the defendant's solicitors for the purpose of the option to purchase; and nor can Messrs Lim, Han & Teoh, as a matter of law, be deemed or presumed to be the solicitors acting for the defendant/vendor at the time when the 10% deposit was purportedly made by the plaintiff to that firm. Indeed, nowhere in the evidence of Mr. Ah Kow @ Han Yek Yong (Mr. Han – PW2), a partner of the firm Messrs Lim, Han & Teoh, who was called by the plaintiff as its witness, did he say that his firm was acting as solicitors for the defendant when his firm received the payment of RM41,000 from the plaintiff. Indeed, there is no evidence at all that the defendant had ever appointed Messrs Lim, Han & Teoh to act for him in the matter of the option or the sale and purchase of the tenanted property.

**[20]** On the other hand, we have the following evidence of Mr. Han (PW2) to the effect that, at the time of the payment of the RM41,000, his firm was only acting for the plaintiff and that the defendant had his own solicitors, Messrs Ho Thian Cheh:

> The exercise of the option, at this time defendant had his own solicitor Mr. Ho Thian Cheh.
>
> …
>
> If option was exercised by plaintiff, RM41,000 was not tendered to defendant. It was kept by us.

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As solicitors acting for plaintiff, cheque for RM41,000 handed to me.

**[21]** The documentary evidence also confirmed that at all material B times the defendant's solicitors were Messrs Ho Thian Cheh & Co. This can be seen from the letter of 20 December 1989 (exh. P5) that Messrs Lim, Han & Teoh wrote to the plaintiff where, in the last paragraph of that letter, it is stated:

C We are presently liaising with the Vendor's solicitors, M/s Ho Thian Cheh & Co. on this matter and upon receipt of their reply we will revert to you.

**[22]** Accordingly, we set aside the order of the High Court, and we allowed the appellant's/defendant's counter-claim against the D plaintiff for delivery of vacant possession of the land within three months from the date of our order, and for payment of double rental as per the pleading.

**[23]** We also made a further order that the caveat lodged by the E plaintiff over the land be removed forthwith.

(There was a cross-appeal by the respondent but it was withdrawn and, accordingly, dismissed with no order as to costs.)

[Appeal allowed with costs of RM15000.]

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